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No. 89-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESLEY P. BERNARD, *et al.*,

Petitioners,

v.

GULF OIL CORPORATION, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

(1) Was the decision of the court below, which is inconsistent with Griggs v. Duke Power Co., 401 U.S. 424 (1971), and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), compelled by Wards Cove Packing Co. v. Atonio, 104 L.Ed.2d 733 (1989)?

(2) Where the basis of a district court decision is erroneous, may an appellate court, consistent with Pullman-Standard v. Swint, 456 U.S. 273 (1982), make its own de novo findings of fact in order to affirm that decision on a new alternative ground?

(3) Was the decision of the court below, which is inconsistent with Teamsters v. United States, 431 U.S. 324 (1977),

compelled by Lorance v. A T & T Technologies, 104 L.Ed.2d 961 (1989)?

(4) Where a plaintiff establishes a prima facie case of intentional discrimination under Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), can that prima facie case be rebutted by post-trial argument of defense counsel?

PARTIES

The petitioners are Wesley P. Bernard, Hence Brown, Rodney Tizeno, Willie Johnson, Doris Whitley, and the class of all blacks employed in hourly positions at the Port Arthur refinery of the Gulf Oil Corporation, on or after December 26, 1966, who have not executed releases of their claims.

The respondents are Gulf Oil Corporation, Chevron U.S.A. Inc., successor in interest to the Gulf Oil Corporation, Chevron Corporation, parent company of Chevron U.S.A. Inc., the Oil Chemical and Atomic Workers' International and its Local No. 4-23.

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In The

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October Term, 1989

WESLEY P. BERNARD, et al.,

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v.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioners Wesley P. Bernard, et al., respectfully pray that a writ of certiorari issue to review the judgments and opinions of the Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

This case was last before this Court in 1981. Gulf Oil Co. v. Bernard, 452 U.S.

89 (1981). On remand the district court issued two successive opinions. The first, reported at 643 F. Supp. 1495 (E.D. Tex. 1986), is set out at pp. 209a-256a of the Appendix. The second district court decision, which is not officially reported, is set out at pp. 135a-208a of the Appendix. There were on remand two appellate opinions as well. The first, reported at 841 F.2d 547 (5th Cir. 1988), is set out at pp. 45a-134a of the Appendix. The most recent court of appeals decision, reported at 890 F.2d 735 (5th Cir. 1989), is set out at pp. 1a-44a of the Appendix.

JURISDICTION

The most recent decision of Fifth Circuit was entered on December 18, 1989. On March 7, 1990, Justice White signed an order extending the date for filing this petition to April 17, 1990. Jurisdiction

of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in Appendix C.

STATEMENT OF THE CASE

This class action was originally filed in 1976 by six present or retired black employees of the refinery operated in Port Arthur, Texas, by the Gulf Oil Corporation. The plaintiffs alleged that they had been subjected to a variety of racially discriminatory practices, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e et seq., and 42 U.S.C. § 1981. Named as defendants were Gulf and the Oil Chemical and Atomic Workers' International Union and its Local 4-23.

The district court, shortly after the filing of the complaint, granted summary judgment to the defendants. The Fifth

Circuit reversed, and ordered that the claims be tried on the merits. The district court in 1976 had entered an order enjoining plaintiffs' counsel from discussing the case with members of the putative class which they represented. The Fifth Circuit, sitting en banc, held that that order violated the First Amendment. 619 F.2d 459 (5th Cir. 1980) (en banc). This Court granted certiorari with regard to the disputed gag order, and struck it down on non-constitutional grounds. 452 U.S. 89 (1981).

On remand, the district court initially certified a class of all blacks who had worked or applied for work at the refinery in union covered jobs after December 26, 1966. A year later, shortly before the case was to be tried on the merits, the district court modified that certification order to exclude a

substantial number of class members. (48a-50a) The case was tried in April, 1984. In September 1986, the district court issued its first opinion on the merits of the underlying claims, ruling for the defendants on all issues. (209a-265a).

The Fifth Circuit reversed, and directed the district court to reconsider its disposition of a number of the discrimination claims. (45a-134a) On remand the district court again ruled in favor of the defendants on all issues. (135a-208a) On appeal the defendants argued that the case was controlled in a number of important respects by this Court's intervening decisions in Wards Cove Packing Co. v. Atonio, 104 L.Ed.2d 733 (1989)and A T & T Technologies v. Lorance, 104 L.Ed.2d 961 (1989).[1] The Fifth Circuit

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[1] Appellees Supplemental Brief, No. 88-6141 (5th Cir.)

affirmed the decision of the district court. (1a-44a).

STATEMENT OF THE FACTS

Gulf Oil's Port Arthur refinery, originally opened at the turn of the century, has for many decades employed a substantial number of black workers. Prior to 1954 the refinery was overtly structured along racial lines. Whites and blacks worked together in the same departments, but were classified separately for seniority and personnel purposes, and belonged to different unions.

> [T]he . . . integrated departments functionally had two separate lines of progression, one for their white employees and the other for the black employees. . . . These integrated departments had distinct seniority rosters, one denoted "White" ... and the other denoted "Colored".... Although black laborers worked in many of the same departments as white ... employees, they could not bid into the more desirable white lines of progression.

(59a-60a). In 1954 several black employees insisted on transferring into previously "white" jobs; the company and union responded by suspending promotions for a two-year period. (60a-61a).

Between 1954 and 1956 a nominal restructuring occurred at the refinery. The refinery was ostensibly divided into two major divisions, the "Operating and Mechanical Division," and the "Labor Division." In reality, however, this was simply a relabeling of the old "White" and "Colored" jobs.

> The composition of th[e] departments and subdepartments and their lines of progression remained basically unchanged . . . . The labels on the seniority rosters in these integrated departments were changed from "White" to "Operating and Mechanical Division" and from "Colored" to "Labor Division."

(61a-62a). At the same time that it created these two Divisions, Gulf adopted several rules which expressly restricted

workers in the all-black Labor Division from transferring into the all-white Operating and Mechanical Division. No employee in the Labor Division was permitted to transfer into an O&M job unless he or she had a high school diploma and could pass a number of written tests; whites in the O & M Division, however, could freely transfer into other O & M jobs without meeting those requirements. As a practical matter few whites had ever taken the tests at issue, and many lacked high school degrees.[2] Transferees from the Labor Division lost all but one-day of their seniority. The Fifth Circuit acknowledged that these three barriers were adopted in

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[2] PX 17 (In 1965, of 69 Opertor No. 1's whose education could be determined, 33 lacked a high school degree); PX 19 (In 1960, of 99 pipefitters, 56 lacked a high school degree.)

1956 for the purpose of preventing blacks from moving into O & M jobs. (73a-76a).

Those three barriers were rescinded in 1963 as a result of pressure from the federal government. (66a). This litigation concerns the practices and barriers which remained in place after 1963, and which continued for years thereafter to prevent blacks in the Labor Division from moving into jobs in the O & M Division.

(1) Promotion Tests

Many of the most desirable positions at the refinery are craft jobs; there are more than a dozen distinct crafts, including carpenters, painters, boiler- makers, and pipefitters. Persons selected for a craft position first enter a "mechanical training program" that lasts several years; upon completing that program they become number one craftsmen. Prior to

1967 there were virtually no blacks in craft jobs or the mechanical training programs. 841 F.2d at 561.

Vacancies in mechanic trainee positions are ordinarily posted for bid, and selections are made on the basis of seniority. Since 1947 Gulf has, somewhat intermittently, used written examinations to screen applicants for mechanic trainee positions. From 1947 to 1971 Gulf used a set of tests known as the Old Tests; since 1971 Gulf has used a different set, referred to as the New Tests. 841 F.2d at 561. On a number of occasions, however, Gulf has exempted employees from these tests; as of 1970 a majority of the white craftsmen had in fact never taken the test.[3]

The district court found that both sets of tests had an adverse impact,

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[3] DX 94, 95; PX 23, 24.

screening out a disproportionately large portion of black senior bidders for mechanic trainee positions. The comparative pass rates were as follows:

	Pass Rate	
	Old Tests	New Tests
Blacks	42.8%	66.0%
Whites	82.5%	97.7%

(98a) Petitioners contended below, and the lower courts found, that the test had an unlawful disparate impact in violation of Title VII. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). The central issue at this point in the litigation is whether the tests were job-related.

(2) Stipulation 29

Under ordinary circumstances Gulf promoted an average of approximately 15 employees a year into mechanic trainee

positions.[4] In 1967, however, Gulf and the OCAW entered into a special agreement, known as Stipulation 29, pursuant to which 203 employees were summarily classified into mechanic trainee positions. None of these positions were ever posted or opened for seniority based bids, the manner in which trainee positions were normally filled both before and after 1967. The employees promoted under Stipulation 29 were also exempted from the Old Tests then in use to screen employees seeking craft trainee positions. The shear size of this unique en masse promotion was so great that for years thereafter Gulf made virtually no further promotions into the affected crafts. Under Stipulation 29, for example, 100 employees became pipefitter

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[4] DX 110; PX 87. No new craft trainees were added in 1965, and only 12 were selected in 1966. Id.

trainees in early 1967; the next pipefitter trainee was not selected until 1972. (PX 87.) Of the 203 employees promoted under Stipulation 29, 194 were white.

The Fifth Circuit agreed that the massive ad hoc promotions under Stipulation 29, accomplished outside of the normal promotion rules, had an adverse effect on blacks:

> [W]e hold that Stipulation 29 had an adverse impact on blacks at a substantially higher rate than on whites. The record indicates that only 4.4% of employees reclassified as Mechanical Trainees by Stipulation 29 were black and that, due to Gulf's pre-Act seniority system, 100% of the employees in the Utility Man classification in the Labor Division (in 1966) were blacks, with, almost universally, more seniority than whites reclassified as Mechanic Trainees. ... In 1967 many blacks lost the <u>opportunity</u> to use their superior seniority to bypass junior whites and as a consequence arrived at top positions at a later time than they would have absent Stipulation 29.

(90a-94a) (Emphasis in original). Because of the many decades in which they had been

unable to use their accumulated seniority, blacks were the most senior bidders on 40% of the craft vacancies that were filled under the normal rules in this era;[5] the Stipulation 29 promotions, however, accounted for the vast majority of all craft trainees selected during the seven years from 1965 to 1972, inclusive.

In the courts below petitioners claimed that Stipulation 29 was adopted with a discriminatory motive, and was intended as a preemptive strike to provide to relatively junior whites the equivalent of 10 years of promotions before more senior blacks, invoking their rights under Title VII, could bid on those jobs. Petitioners also maintained that Stipulation 29 had an unlawful disparate impact, because it had a proven adverse

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[5] DX 131;, PX 25.

impact on blacks and was not justified by business necessity.

(3) The Seniority System

Petitioners asserted in the lower courts that the Gulf-OCAW seniority system unlawfully perpetuated the effects of past discrimination. The seniority rules perpetuated past discrimination in much the same manner as in other seniority cases which this Court has reviewed. Most operating (i.e. non-craft) jobs at the refinery were arranged in lines of progression. (57a-58a) When a vacancy arose, promotions were made on the basis of seniority, but only workers in the job immediately below the vacancy could bid on the position. Since all O & M jobs had for decades been deliberately limited to whites, many of the operating jobs were held by whites with far less seniority than large numbers of blacks in the Labor

Division. Thus under the seniority rules a desirable position could be awarded to a white, in the line of progression at issue, with only 10 years of seniority, ahead of blacks who had 20 or 30 years of seniority but were in the Labor Division. That was the practice even where, as was the case before and after 1965, black workers classified in the Labor Division in practice actually worked in the very department in which the vacancy arose. As of 1965 there were a total of 85 positions at the refinery paying over $3.50 per hour; under the seniority rules no blacks were eligible to bid on 72 of those jobs. (PX 37, 38) Between 1965 and 1970 Gulf promoted a total of 47 workers into No. 1 operator jobs, the best paid operating position; despite the fact that there were large numbers of blacks with many decades of

seniority, only one of these promotions went to a black. (DX 98)

The central issue in the courts below was whether this seniority system was bona fide within the meaning of section 703(h) of Title VII. See Teamsters v. United States, 431 U.S. 324 (1977).

(4) The Individual Claims

Several of the named plaintiffs alleged that they had unlawfully been denied promotions to supervisor because of their race. The district court initially rejected two of these claims because the two plaintiffs, Hayes and Brown, had never applied for appointment to the position of supervisor. (202a). The Fifth Circuit in 1988 reversed on the ground

> that supervisory vacancies were not announced prior to 1982 and that no application process existed. It is not legally sufficient for an employer to reject an employee who does not

> have notice or an opportunity to apply for a promotion.

(127a-128a). The district court in its first opinion rejected the promotion claim of the third plaintiff, Tizeno, on the ground that he had failed to prove "that he was better qualified" than the white who won the disputed promotion. (215a). The court of appeals 1988 opinion reversed this as well, holding as a matter of law that a Title VII plaintiff need not prove that he or she is better qualified than the white actually promoted. (129a). See Patterson v. McLean Credit Union, 105 L.Ed.2d 132, 157-58 (1989).

On remand in 1988 the district court again rejected all three promotion claims, and petitioners appealed. The Fifth Circuit held in 1988 that Tizeno had made out a prima facie case (129a), and assumed in 1989 that Hayes and Brown had done so as

well. (38a) The legal issue at this juncture is whether Gulf met its burden under Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981), to produce "evidence that plaintiff was rejected . . . for legitimate, non-discriminatory reasons."

REASONS FOR GRANTING THE WRIT

This aging Title VII case starkly illustrates the difficulty faced by Title VII plaintiffs who must, in Judge Posner's recent words "negotiate the treacherous and shifting shoals of present day federal employment discrimination law." Malhotra v. Cotter & Co., 885 F.2d 1305, 1313 (7th Cir. 1989). This case was originally filed in 1976. The district court promptly dismissed the complaint, and enjoined plaintiffs' counsel from communicating with the class they represented; both orders were overturned on appeal, but these pre-

trial disputes were not finally resolved until this Court's 1981 decision in the instant case, some five years after the complaint was originally filed. The case was tried in the spring of 1984; after a two year delay the district court finally issued a decision on the merits in the fall of 1986. An appeal, a remand, and yet another appeal followed.

At this juncture most of the legal issues in this case turn on opinions issued by this Court many years after the complaint was first filed. The most recent Fifth Circuit decision turns in particular on decisions handed down by this Court in June, 1989, 13 years after the case began, and 5 years after it was tried.

I. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE DECISION BELOW, WHICH CONFLICTS WITH GRIGGS v. DUKE POWER CO., 401 U.S. 424 (1971), AND ALBEMARLE PAPER CO. v. MOODY, 422 U.S. 405 (1975), WAS COMPELLED BY WARDS COVE PACKING CO. v. ATONIO, 104 L.Ed.2d 733 (1989)

Fifteen years ago in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), this Court set out in detail and with precision "the appropriate standard of proof for job relatedness" in a disparate impact case. 422 U.S. at 436. Had the most recent Fifth Circuit decision in the instant case been handed down in 1980 or 1985, review would have been sought on the ground that the decision conflicted both with Albemarle and with Griggs v. Duke Power Co., 401 U.S. 424 (1971), as well as with the prevailing law in numerous circuits. In the wake, however, of Wards Cove Packing Co. v. Antonio, 104 L.Ed.2d 733 (1989), neither

litigants nor lower court judges can assert with any confidence that even the most implausible of tests or other job requirements might not be legally "job related." Certiorari should be granted here for the same reason it was granted in Albemarle, to clarify "the showing required to establish . . . 'job relatedness'". 422 U.S. at 413.

We ask the Court, not to overturn Wards Cove, but merely to explain it. The new substantive standard announced in Wards Cove is "whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer." 104 L.Ed.2d at 752. Whatever the Court meant by this new phrase cannot be divined by orthodox legal research; in the 17 years between Griggs and Watson v. Fort Worth Bank & Trust Co., 101 L.Ed.2d 827 (1988), there is not a single lower

court decision utilizing or referring to such a standard. Wards Cove reduces the burden on an employer in a disparate impact case from a burden of proof to a burden of production, 104 L.Ed.2d at 753; just how much evidence an employer must produce is obscured, not only by the novelty of the underlying standard, but by the Court's insistence that Griggs and its progeny should all along have been understood in this way. The lower courts, until a year ago, uniformly read Griggs in precisely the opposite manner.

The lower courts do understand that the purpose and effect of Wards Cove is to make it more difficult for plaintiffs to prevail in disparate impact cases. In the ten months since Wards Cove was decided, it appears that no circuit court in the country, reaching the merits of a case for

the first time,[6] has sustained a disparate impact claim. There is agreement that Wards Cove eliminated the "necessity" in what had long been characterized by federal courts at all levels as the "business necessity defense," e.g., Allen v. Seidman, 881 F.2d 375, 377 (7th Cir. 1989); but what Wards Cove may have established in place of that familiar standard remains entirely obscure.

The Fifth Circuit in the instant case read Wards Cove as virtually eviscerating Griggs and Albemarle. It is difficult to say whether that conclusion is inconsistent with the broad language in Wards Cove. But the Fifth Circuit had no doubt that Wards Cove required it to sustain in this case

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[6] Plaintiffs have prevailed only in a case where a defendant asked the appellate court to set aside its own earlier liability finding. Green v. USX, 52 FEP Cas. 168 (3d Cir. 1990) (refusing to set aside 1988 Third Circuit opinion).

tests that combined the very characteristics which had led this Court to condemn the tests at issue in Griggs and Albemarle; indeed, one of the tests sustained below was among the very tests disapproved by this Court in Griggs and Albemarle.

Griggs emphasized at the outset that the particular tests in that case functioned as a barrier preventing blacks from entering the very jobs which the company had for years expressly limited to whites. 401 U.S. at 427. The Court asserted, without even mentioning the possibility of a business necessity justification, that

> [u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.

401 U.S. at 430. The tests at issue in this case have exactly the same effect as those in Griggs, freezing the effects of past discrimination. Here the tests were used to reject applicants for craft jobs; prior to 1955 blacks were overtly barred from those jobs, and from 1955 to 1963 black were excluded by means of job requirements which the court of appeals held were racially motivated. As of 1965, out of several hundred craftsmen at the Gulf refinery, not one was black.[7] The promotion test used by Gulf after 1971 (the "New Test") was particularly effective in singling out blacks for rejection. Over 90% of the employees who failed that test were black; conversely, over 97% of all

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[7] The first black craftsman, a painter, became No. 1 craftsman in 1967. PX-87.

whites passed the New Test. (PX 27; DX 108).

Both Griggs and Albemarle thought it particularly fatal to a claim of job relatedness that in those cases many whites had been promoted without ever being required to meet then job requirements imposed on blacks. In Griggs and Albemarle whites had escaped the disputed requirements because they had been promoted into the units at issue before the requirements were adopted. In Griggs the Court emphasized

> [t]he evidence . . . shows that employees who have not completed high school or taken the tests have continued to perform satisfactorily and make progress in departments for which the high school and test criteria are now used.

401 U.S. at 432. The Court thought this practice probative evidence that the new requirements were not needed. Similarly the Court stressed in Albemarle:

> Incumbents in the skilled lines, some of whom had been hired before adoption of the tests, were not required to pass them to retain their jobs or promotion rights. The record shows that a number of white incumbents in high ranking job groups could not pass the tests.

422 U.S. at 429.[8]

The same circumstance which weighed so heavily against the job requirements in Griggs and Albemarle was present in this case. As of 1970[9] the majority of the white craftsmen in the largest crafts had been promoted without ever having taken the disputed tests.[10] The circumstances in the instant case are even more egregious than

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[8] See also 422 U.S. at 434 ("incumbent employees are permitted to work at even high-level jobs without passing the company's test battery.")

[9] The limitations period in this case runs from 1966.(99a).

[10] Of 140 boilermakers, 93 had never taken the Old Test. Of 176 pipefitters, 114 had never taken the Old Test. DX 94, 95; PX 23, 24.

in Griggs and Albemarle, where whites had avoided the job requirements simply because they were promoted before those requirements were instituted. Here Gulf, having established the tests as a prerequisite to promotion in 1947, proceeded to exempt large numbers of employees, virtually all of them white, from that very requirement. Between 1967 and 1971, for example, 292 employees were admitted to craft programs; of this group, however, 203 had been exempted from the tests and 194 of those exemptions had gone to whites. (DX 110; 86a).

Albemarle explained that a job requirement with adverse impact could be used if it was "predictive of or significantly correlated with important elements of work behavior." 422 U.S. at 431. (Emphasis added) Griggs emphasized that any such requirements "must measure

the person for the job and not the person in abstract." 401 U.S. at 436. What actually occurred in this case is a parody of the abuse condemned in Albemarle and Griggs. One of the largest crafts for which Gulf used the disputed tests, for example, was boilermaker; Gulf's own supervisors, when asked to describe the most important duties of boilermakers, responded that they needed to be able to work with hand tools, to work at heights over four feet, and to work outside. (See Appendix A) Gulf might plausibly have required employees seeking this position to demonstrate manual dexterity, a good sense of balance, or an ability to function in hot or cold temperatures. Instead Gulf utilized tests requiring applicants to demonstrate a good vocabulary, proficiency at mathematics, and knowledge of

chemistry.[11] It is not to be believed that English professors are especially good with their hands, that mathematicians work well on high platforms, and that chemists are especially adept at laboring outside in a sweltering Texas summer. Conversely, Gulf's supervisors, being expressly queried about these issues, acknowledged that reading, mathematics and chemistry were all of little or no significance to the work of a boilermaker.[12] The district court expressly held that black workers who failed the disputed tests in large numbers, generally had the abilities and experience

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[11] 95a n. 35; 96a n. 36.

[12] Asked to evaluate the importance of various reading skills for the work of boilermakers, the supervisors rated them 20th, 2nd, 28th, 34th, 44th and 76th in overall importance. Various mathematical abilities were rated 15th, 21st, 29th, and 68th in importance. Understanding of chemistry was rated 46th. DX 162.

required to carry out the duties of craftsmen.[13]

In the instant case, of course, Gulf did not claim that proficiency in reading or mathematics was related to or predictive of proficiency with a hammer or a drill. Instead, Gulf offered an ingeniously circular form of validity study. Rather than inquire whether high scoring employees were more adept at such manual tasks, Gulf asked its supervisors to assess which workers had a greater "ability" in reading and mathematics. (DX 162) Not surprisingly, employees whom supervisors thought adept at reading and mathematics had done

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[13] 237a ("[M]ost of Plaintifs actual duty elements involved abilities Plaintifs should have already earned in the Labor Division. For example, each aspiring craftsman had already acquired the basic hands-on skills in the use of tools and materials.")

well on the company's reading and math test.

Albemarle also emphasized that, even where a test was valid with regard to one job, only under rare circumstances could an inference be drawn that the test was valid for some other job. In Albemarle, although the tests at issue were utilized in 13 lines of progression, the company attempted a validity study with regard to only 7 of those lines. 422 U.S. at 413. The study itself purported to find a significant correlation between job performance and test scores for only about one half of the studied jobs. 422 U.S. at 432. The Court in Albemarle refused to permit an inference of validity as to the jobs not studied, or regarding the jobs for which no correlation had been found.

> Even if the study were otherwise reliable, this odd patchwork of results would not entitle

> Albemarle to impose its testing program under the [EEOC] Guidelines. A test may be used in jobs other than those for which it has been professionally validated only if there are "no significant differences" between the studied and unstudied jobs . . . [T]he study's checkered results appear to compel the opposite conclusion.

422 U.S. at 432.

The business justification adduced by Gulf in the instant case suffers from the very flaw condemned by this aspect of Albemarle. Gulf actually used the tests at issue to make promotions into 14 craft positions.[14] Gulf limited its validity study to only five of these crafts, and claimed to have found a significant correlation as to only two, boilermaker and

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[14] The 14 crafts were boilermaker, pipefitter, welder, carpenter, instrument man, bath-house mechanic, garage mechanic, heavy equipment operator, insulator, maintenance mechanic, painter, tinner and lead, junior drafting technician and junior estimator.

pipefitter. (107a) Gulf's study revealed that all welders performed equally well regardless of their test scores. The study regarding carpenters and instrument men failed to show any significant correlation because the employee rating criteria Gulf utilized were so unrelated to the actual work of these craft workers that their supervisors could not agree on how to rate particular employees. (107a n. 41) Gulf's own analysis of the duties of lab technicians and instrument mechanic, two of the crafts for which the tests were used, showed they had little in common with the duties of boilermakers and pipefitters. (See Appendix B). Gulf did not undertake any comparison of the duties of boilermakers and pipefitters with the duties of most of the crafts for which no study was attempted; the company did not, and could not, claim that painters,

carpenters, pipefitters and laboratory technicians, four of the diverse crafts at issue, do essentially the same thing. This is precisely the sort of crazy quilt pattern which Albemarle insisted would preclude inferring that a test was valid for a job which had not been studied, or regarding which a study had shown no correlation.

Albemarle warned, finally, against attempting to infer the validity of one test from evidence that another test was job related. In that case the employer used two forms of the Wonderlic Test, which were "in theory, identical and interchangeable measures of verbal facility". 422 U.S. at 431-32. But when an actual validity study was conducted, the two versions of the test yielded strikingly different results; in three instances the study indicated that one form of the test

was valid, but the other was not. In the instant case Gulf, having adduced a validity study regarding the post-1971 New Tests, urged the courts to infer from that evidence that the pre-1971 Old Tests were also valid. Here, unlike Albemarle, it was conceded that the sets of tests were in fact quite different.[15] It is also undisputed that the Old Tests were scored far more stringently than the New Tests.[16] Gulf's failure to directly validate the Old Tests was particularly inexcusable because

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[15] The Old Tests included both a test of reading comprehension and the Wonderlic Personnel Test; neither are part of the New Tests. Conversely, two of the four New Tests concern chemical comprehension and learning ability, elements not encompassed within the Old Tests. (95a n. 35; 96a n. 36).

[16] Only 2.3% of whites failed the New Tests, whereas 17.5% of whites failed the Old Tests. Among blacks the failure rates were 34% and 57.2% on the New and Old Tests respectively.

it knew when they were still in use that the tests might well not be valid.[17]

Measured against the standard in Griggs and Albemarle, the defendants' claim of job relatedness should have been dismissed out of hand. The defense adduced in this case suffers from virtually every flaw condemned in Griggs and Albemarle. Indeed, this case involves the very same test that was condemned by this Court in Griggs and Albemarle, the Wonderlic Personnel Test. Compare 95a n.35 with Griggs, 401 U.S. at 428 and Albemarle, 422 U.S. at 432. The correlations which Gulf claimed to have found in this case between its tests and actual job performance were far smaller

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[17] PX 6, Letter of Port Arthur Personnel Director to Consultant on Validation, February 17, 1969, ("we realize that we may not be able to validate some, or perhaps all, of these tests for the purpose for which we use them.")

than the correlations relied on by the defendant in Albemarle.[18]

The district court, however, held that it was obligated to sustain the tests in light of the new, "rather lighter" standard of business justification in Watson v. Ft. Worth Bank and Trust Co., 101 L.Ed.2d 827 (1988). (185a). The Fifth Circuit, relying on Wards Cove and Watson, concluded that it too was required to sustain the tests at issue. The impact of Wards Cove on the appellate court can be discerned in several critical differences between the Fifth Circuit's 1988 and 1989 opinions. In 1988 the Fifth Circuit directed the trial court to consider the results of all five validity studies, not just the two that had produced results favorable to the company

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[18] Compare Albemarle, 422 U.S. at 437 (correlations of .50, .50, .64, .75, .76, and 1.00), with DX 162, p. 38 (correlations as low as .14).

(116a); in 1989 the Fifth Circuit no longer regarded the three unfavorable studies as relevant, and held that the tests were job related, inter alia, for selecting welders, despite the undisputed fact that the job performance of low-scoring welders was in reality identical to the job performance of high scoring welders.[19] Similarly, in 1988 the Fifth Circuit insisted that the courts could not determine the validity of the tests without first resolving conflicting evidence regarding how frequently, or

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[19] Gulf's testing expert testified as follows:

> "A. ... Welders were not included because there was no real performance difference ...
>
> Q. In other words, whether a welder had a high score or a low score on a test, his job performance was about the same?
>
> A. That is correct."

Tr. 1084-85.

infrequently, high scoring applicants performed better on the job, i.e. the "correlation coefficient (113a-115a); in 1988 the Fifth Circuit no longer thought this issue important, sustaining the tests without bothering to decide how often test scores correlated with job performance. (28a-29a) The panel read Watson in particular to require federal courts to attach heavy weight to the mere fact that an employer believed in good faith that its tests were job related. Where a substantial dispute arises regarding job relatedness,

> [t]his court will refrain from making business decisions for an employer . . . . "[I]t must be borne in mind that '[c]ourts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." Watson, ___ U.S. ___.

(35a). Both Griggs and Albemarle had previously refused to attach any weight or significance to an employer's belief in the wisdom of its own practices. If, as the Fifth Circuit construed Watson to hold, such a good faith belief can defeat a disparate impact claim, Griggs, and its progeny have collapsed back into a requirement that a Title VII plaintiff prove discriminatory intent. Certiorari should be granted to resolve whether, as the courts below concluded, Wards Cove and Watson have largely eviscerated Griggs and Albermarle.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE WHETHER THE DECISION BELOW, WHICH CONFLICTS WITH TEAMSTERS v. UNITED STATES, 431 U.S. 324 (1977), WAS COMPELLED BY LORANCE v. A T & T TECHNOLOGIES, 104 L.Ed.2d 961 (1989)

This Court held in Teamsters v. United States, 431 U.S. 324 (1977), that a seniority system which perpetuates the

effect of past discrimination does not violate Title VII unless the seniority system itself is not bona fide. 431 U.S. at 348-56. Teamsters indicated that the bona fides of a system turn, inter alia, on the motives underlying the original creation of the system. The Court stressed that the seniority system in that case "did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose." 431 U.S. at 356. (Emphasis added). The same principle was applied in United Airlines v. Evans, 431 U.S. 553 (1977). Four years ago this Court, in explaining Evans, emphasized that the plaintiff in that case "had made no allegation that the seniority system itself was intentionally designed to discriminate." Bazemore v. Friday, 478 U.S. 385, 396 n.6 (1986). Bazemore, made

clear that a practice adopted prior to 1965 for racial reasons "became a violation upon Title VII's effective date". 478 U.S. at 395. American Tobacco Co. v. Patterson, 456 U.S. 63 (1982), insisted that "Teamsters places no importance on the date the seniority system was adopted, and we follow Teamsters by refusing to distinguish among seniority systems based on date of adoption." 456 U.S. at 76 n.16. In Pullman-Standard v. Swint, 456 U.S. 273 (1982), this Court evaluated at length evidence regarding the motives of parties responsible for the creation of a seniority system in the 1940's and 1950's.

Teamsters, Bazemore and American Tobacco hold that a seniority system created or structured prior to 1965 for racial reasons is not bona fide under Title VII. The opinions below are clearly in conflict with this Court's decisions in

Teamsters, Bazemore and American Tobacco. The Fifth Circuit in 1988 correctly concluded that the basic structure of the Gulf-OCAW seniority system was erected with a discriminatory purpose. The so-called "Labor" and "Operations and Maintenance" Divisions created in 1956, as the Fifth Circuit acknowledged, were simply a relabeling of the old "Colored" and "White" jobs. Employees who worked side by side in the same department were classified into different Divisions, seniority rosters and unions. Again, the distinctions were made along strictly racial lines, conforming to the prior "Colored" and "White" job rosters. The Fifth Circuit properly "inferr[ed] discriminatory intent from Gulf's pre-Act seniority system." (76a).

The courts below held, however, that it was legally irrelevant that prior to 1965 certain critical aspects of the

seniority system had been framed for racial reasons. They deemed such discriminatory genesis to be legally irrelevant, insisting that only additional post-act discriminatory motives could render a system non-bona fide. The Fifth Circuit's 1988 opinion, while acknowledging the original racial purpose of the seniority lines, commented

> [W]e question whether a seniority system ... could ever be held unlawful solely because of pre-Act discrimination. That the 1963 changes did not rectify the effects of past discrimination, and in fact operated in some ways to lock those effects in, does not imply, in the absence of purposeful discrimination in connection with the post-Act system, that this system was not bona fide under § 703(h).

(76a). (Emphasis added). On remand the district court insisted it understood the 1987 appellate opinion to render legally irrelevant any discrimina-tory motive in

the pre-Act creation of the seniority system:

> The Court of Appeals concluded that the seniority system at Gulf could not be found other than bona fide based solely on discrimination occurring before the effective date of Title VII.

(182a). On appeal petitioners urged in vain that this holding was inconsistent with Teamsters and Bazemore. The respondent company argued that

> genesis ... is not controlling. Under Teamsters, there is redemption if the employer goes on to sin no more after the effective date of the Act.[20]

The company relied in particular on the recent decision in Lorance v. A T & T Technologies 101 L.Ed.2d 961 (1989).[21] The Fifth Circuit embraced that view of section 703(h), reiterating that pre-Act

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[20] Brief for Appellees, No. 88-6141 (5th Cir.), p. 16.

[21] Appellee's Supplemental Brief, No. 88-6141 (5th Cir.) pp. 12-13.

discrimination in the creation of a seniority system was in its view legally irrelevant:

> The class ... argu[es] that, while pre-Act discrimination in hiring and assignment will not make a post-Act seniority system which is otherwise bona fide illegal, a pre-Act seniority system which discriminated will make an otherwise bona fide post-Act seniority system illegal. This contention was rejected in our earlier opinion....

(11a-12a). (Emphasis in original).

This aspect of the Fifth Circuit's decision is clearly inconsistent with the holdings in Teamsters, Bazemore and American Tobacco that a seniority system is not bona fide if it had its genesis in discrimination. But it is less clear whether, in this regard, Teamsters, Bazemore and American Tobacco are still good law after Lorance v. A T & T Technologies, 104 L.Ed.2d 961 (1989). The plaintiffs in Lorance claimed that the

seniority provisions at issue there was adopted for discriminatory reasons; that provision had been fashioned after 1965, but more than 300 days before the plaintiffs' EEOC charge. 104 L.Ed.2d at 969. The plaintiffs relied on the passage in Teamsters, quoted above, emphasizing the importance of the genesis of a seniority system. 104 L.Ed.2d at 971. This Court, however, held that the charge in Lorance was untimely, utilizing language which could conceivably be construed to call into question this aspect of Teamsters, Bazemore and American Tobacco.

Earlier this term the defendant in another longstanding Title VII case advanced the view of Lorance evidently accepted by the Fifth Circuit below. Pullman Standard v. Swint, 107 L.Ed.2d 307

(1989).[22] The Court disposed of Swint without reaching that question. This is an important and recurring issue, and certiorari should be granted to resolve it.

III. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN PULLMAN STANDARD V. SWINT, 456 U.S. 273 (1982)

In 1967 respondent, acting pursuant to Stipulation 29, promoted 203 employees, 95% of them comparatively junior whites, into lucrative craft training positions. The legality of this mass promotion is of central importance in this litigation, not only because of the large

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[22] Brief for Respondent in Opposition, No. 88-1602, p. 17 ("Petitioners' challenge to the validity of a facially neutral seniority system adopted in 1954 is time barred. The departmental seniority system challenged in this case was established as a result of the 1954 collective bargaining agreement. . . . Under the Court's Lorance v. AT&T decision, a Title VII challenge to a racially neutral seniority system, as here, requires the filing of a charge with EEOC within 180 days of adoption of the system or it is time-barred.")

number of jobs at issue, but also because it affects the bona fides of the seniority system. (13a-18a) In 1987 the court of appeals held that Stipulation 29 had an adverse effect on senior blacks, and remanded the case for further consideration. Petitioners urged both that Stipulation 29 was racially motivated, and that Stipulation 29 had an unlawful disparate impact not justified by business necessity.

On remand the district court upheld the legality of Stipulation 29, rejecting both the disparate treatment and disparate impact claims. The district court's decision was based on its view that Stipulation 29 had altered both the lines of progression and the assignment rules for craft workers:

> Stipulation 29 essentially eliminated all jobs in the maintenance craft lines of promotion except the No. 1

> Craftsman, the Mechanic Trainee, and the Truck Driver Classification.... Before Stipulation 29 was implemented, the maintenance crafts were characterized by complex lines of promotion.... By increasing the number of "universal mechanics", i.e. people who can perform any job associated with a particular craft, Stipulation 29 further increased productivity.

(140a-145a). The correctness of this finding is not seriously at issue; it was palpably false. The actual terms of Stipulation 29 do not eliminate jobs, alter lines of progression, or alter assignment rules;[23] all Stipulation 29 did was provide for the 203 disputed promotions. In the subsequent appeal, respondents declined to defend or refer to this mistaken finding, and the Fifth Circuit properly did not credit it. (21a).

Because the district court's approval of Stipulation 29 turned on a pivotal but

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[23] The terms of Stipulation 29 are set out at p. 81a n. 23.

clearly erroneous finding of fact, Pullman Standard v. Swint, 456 U.S. 273 (1982), left the appellate court with two options. First, the Fifth Circuit could have remanded the issue to the district court for further findings untainted by the misunderstanding regarding the substance of Stipulation 29. Second, the appellate court could have resolved the legality of Stipulation 29 if that issue turned solely on a question of law.

Instead, disregarding the admonition of Swint, the Fifth Circuit proceeded to take the very step for which it had been reversed in Swint itself -- making its own findings of fact. The appellate court filled the evidentiary gap regarding Stipulation 29 by finding that in 1967 Gulf suddenly needed a large number of additional craft workers: "Gulf . . . wanted to increase the number of craft

trainees." (21a). This pivotal appellate finding provided an important possible basis for Stipulation 29; if Gulf indeed needed another 203 craft workers, its decision to adopt Stipulation 29 would be far more plausible.

In fact, however, Gulf had never claimed, and the district court had never found, that in 1967 there was a shortage of craft workers. On the contrary the district court explained at length that Gulf's major labor problem in this era was a surplus of inefficiently used employees, and that other reforms between 1959 and 1967 had been adopted for the purpose and with the effect of reducing the number of refinery craftsmen.[24] Gulf's own witnesses

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[24] 141a-142a:

> "[M]anpower problems . . . led to inefficient use of personnel.... The Port Arthur Refinery was charged with an operating loss in 1958 of $18

uniformly insisted that the company had too many employees.[25]

> million.... Labor, particularly maintenance [i.e. craft] labor, was a significant component of the excess costs, and the method of making work assignments contributed significantly to the problem.... Gulf's management responded with cost-cutting measures, including work force reductions through attrition and layoff.... Refinery management also sought to increase the efficiency of the work force."

(Emphasis added).

[25] DX 85, pp. 114-117 ("In 1955 the company management felt its level of personnel staffing was excessive. This resulted in a moratorium on the hiring of new personnel. Concurrently, there was initiated a program of attrition through the encouragement of early retirement. In 1957 management cost analyses indicated that the refinery continued to be overmanned in virtually all phases of operations and maintenance. . . . A large percentage of this labor cost was being charged to maintenance labor. . . . Since 1962 . . . [t]he company has established a personnel policy of hiring one new employee for every two employees that leave the company.")

Review of this aspect of the case is warranted, not because the Fifth Circuit erred as a matter of fact, but because the appellate opinion simply flies in the face of this Court's decision in Swint,

> When an appellate court discerns that a district court has failed to make a [needed] finding ..., the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings: "[F]act finding is the basic responsibility of district courts rather than appellate courts..." Yet the Court of Appeals ... failed to remand for further proceedings.... Instead the Court of Appeals made its own determination.

456 U.S. at 291-92. In Swint itself the Fifth Circuit relied on its own findings of fact to overturn a district court decision; here the Fifth Circuit relied on its own factual findings to provide an alternative ground for affirming a district court decision. But under Swint that is a distinction without a difference. The purpose of Rule 52 is not to maximize the

odds that a district court decision will be upheld, but to assure that the primarily responsibility for resolving factual issues remains in the trial courts. Where, as here, a district court decision is tainted by error, the proper course under Swint is to direct the trial court to consider the matter anew, not for an appellate court to "assist" the district judge by making supplemental factual findings of its own.

IV. THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISION IN TEXAS DEPT. OF COMMUNITY AFFAIRS V. BURDINE, 450 U.S. 248 (1981)

The individual claims in this case present a recurring problem central to the meaning of Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Three of the petitioners claimed and testified that they had been denied promotions to supervisory positions because of their race. Gulf initially chose to

stake its defense on its contention that these claimants had failed to establish a prima facie case of discrimination. The company never called a personnel or any other official to testify as to what non-discriminatory reason, on his or her view, was the actual consideration which led to denials of the disputed promotions.

The district court initially held that the three claimants had failed to establish a prima facie case. (247a, 250a, 251a). The Fifth Circuit reversed. (126a-129a). On remand the company made no effort to adduce additional evidence. Instead, Gulf submitted in, 1988, a legal memorandum which for the first time purported to offer the reasons why the petitioners had not been promoted.[26] Petitioners objected that

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[26] Defendant Gulf Oil Corporation's Proposed Findings of Fact and Conclusions of Law on Remand, pp 23-28.

under Burdine such a defense could only be offered by way of testimony from a knowledgeable witness. But the district court accepted as truthful and persuasive the reasons advanced in that memorandum by Gulf's attorneys; indeed all of the district court's 1988 "findings" regarding the individual claim were taken, verbatim, from Gulf's written submission.[27]

On appeal the central issue was whether, consistent with Burdine, an employer could rebut in this way a prima facie case of discrimination. The Fifth Circuit held that under Burdine it was permissible for an employer to adduce its purported legitimate reason in argument of counsel, so long as the argument of counsel was related to some facts in the record:

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[27] Compare id. at 23-28 with 174a-180a.

> Plaintiffs argue that Gulf's reason for not promoting [petitioners] was only asserted through arguments of counsel. The issue was not merely raised in the arguments of counsel, however, for there is ample evidence in the record to support the district court's finding.

(40a). On the Fifth Circuit's view an employer need not adduce direct testimony identifying, or even disclose at trial, the nature of the non-discriminatory reason on which it intends to rely to rebut a prima facie case. An employer can defer identifying its purported non-discriminatory reason until the filing of a brief long after trial, so long as the reason ultimately offered has some evidentiary foundation. Here the case was tried in April, 1984; the memorandum of respondents which first disclosed the reasons relied on by the company, and ultimately accepted by the courts below, was filed in 1988.

The decisions of the district court and Fifth Circuit are squarely inconsistent with Burdine. Where as plaintiff makes out a prima facie case of discrimination, Burdine provides that

> The defendant must set forth, through the introduction of admissible evidence, the reason for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.
>
> An articulation [of the non-discriminatory reason] not admitted into evidence will not suffice. Thus, the defendant cannot meet its burden merely ... by argument of counsel.

450 U.S. at 255 and n. 9 (Emphasis added). The Fifth Circuit held, to the contrary, that the "reason" or "explanation" need not be offered or admitted at trial, so long as there is evidence which supports a reason later adduced by argument of counsel.

Burdine insists on the introduction of evidence identifying the purported non-discriminatory reasons in order

> to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext.[28]

450 U.S. at 255-56. But where, as here, the purported non-discriminatory reason is first identified years after trial, a plaintiff has no opportunity whatever to offer evidence that that reason is pretextual. In the instant case, for example, Gulf asserted in 1988, and the district court held, that petitioners Hayes and Brown had been denied promotions because "Gulf did not know they wished to be promoted" (178a), since neither had "express[ed] an interest in a supervisory job" (175a). Had this reason been offered at trial, petitioners might have demonstrated in a variety of ways that it was pretextual, such as by adducing evidence that Gulf had in fact promoted

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[28] 450 U.S. at 255-56.

whites despite the fact that they, like Hayes and Brown, had never expressed an interest in a supervisory job.

The decision of the Fifth Circuit is squarely inconsistent with the decision of the District of Columbia court of appeals in Lanphear v. Prokop, 703 F.2d 1311 (D.C. Cir. 1983). In Lanphear the district court upheld an explaniation which, although it had some factual foundation, had never been offered by defendants during trial as the actual reason for their conduct. The court of appeals, relying on Burdine, reversed:

> The purpose of [Burdine's] allocation [of burdens] is to focus on issues and provide plaintiff with "a full and fair opportunity" to attack the defendant's purported justification. That purpose is defeated if defendant is allowed to present a moving target or, as in this case, conceal the target altogether.

703 F.2d at 138. In the instant case that target -- the purported reasons for denying

the disputed promotions -- remained concealed until long after trial.

The decision of the Fifth Circuit expressly permits an employer to postpone revealing its purported justification until long after trial. Under such a procedure a Title VII plaintiff, as occurred here, would never have an opportunity to offer evidence attacking that explanation. In the absence of such proof of pretextuality, the mere post-trial assertion of a reason by defense counsel would automatically be conclusive of the litigation. That is not the order of proof contemplated by Burdine or McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

CONCLUSION

For the above reasons, a writ of certiorari should be granted to review the judgments and opinions of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Supervisors Rating of Most Important Boilermaker "Duty" Elements

1. Using common hand-held non-power tools (e.g., hammer, wrench, screwdriver, etc.)

2. Follow established safety procedures.

3. Working at heights more than four feet off the ground.

4. Using common hand-held power tools (e.g. drills, wrenches, saws, etc.).

5. Working as a member of a team.

6. Carry out simple oral instructions.

7. Working outside.

8. Using handling and lifting devices (e.g. winches, gin-poles, A-frames, etc.).

10. Maintaining clean, orderly, safe work area.

Source: DX 162.

APPENDIX B

Supervisors Rating of Three Most Important "Duty" Elements, Port Arthur Craftsmen

Boilermaker

1. Using common hand-held non-power tools.
2. Following established safety procedures.
3. Working at heights more than four feet off the ground.

Pipefitter

1. Assembling or installing piping or piping systems.
2. Using common hand-held non-power tools.
3. Maintaining clean, orderly, safe work area.

Lab Analysis/Technician

1. Following routine laboratory procedures.
2. Obtaining samples, testing, and interpreting results.
3. Performing simple arithmetic calculations.

Instrument Mechanic

1.* Adjusting or calibrating machines.

1.* Performing routine maintenance of pneumatic, electrical, or other instruments.

3. Performing minor repairs on pneumatic, electrical or other instruments.

Welder

1. Operating welding equipment.

2. Working outside.

3. Following established safety procedures.

Carpenter

1. Using common hand-held non-power tools.

2. Working at heights more than four feet off the ground.

3. Carrying out simple oral instructions.

* Where two elements have the same ranking, they were regarded by supervisors as of equal importance.

Source: DX 162.

APPENDIX C

42 U.S.C. § 2000e-2 (a)(1) provides:

> It shall be an unlawful employment practice for an employer --
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e (h) provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system.